Supreme Court, U.S.
FILED
NOV 9 - 2009
OFFICE OF THE CLERK

144

(6)

No. 09-363

In the Supreme Court of the United States

KEVIN COOPER,

Petitioner,

v.

ROBERT K. WONG, ACTING WARDEN, SAN QUENTIN STATE PRISON, SAN QUENTIN, CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

David T. Alexander
Law Office of David T. Alexander
332 Sheridan Avenue
Piedmont, CA 94611
Telephone: (650) 387-4382
Facsimile: (510) 654-3773

*Norman C. Hile
ORRICK, HERRINGTON & SUTCLIFFE LLP
400 Capitol Mall
Suite 3000
Sacramento, CA 95814
Telephone: (916) 329-7900
Facsimile: (916) 329-4900

Counsel for Petitioner

November 9, 2009

* Counsel of Record

TABLE OF CONTENTS

Page

INTRODUCTION 1

QUESTION 1: IS A PERSON CONVICTED OF MURDER, BUT LATER SHOWN TO BE INNOCENT, ELIGIBLE FOR EXECUTION? 1

QUESTION 2: WHEN A DISTRICT COURT MUST CONDUCT AN EVIDENTIARY HEARING WITH RESPECT TO EVIDENCE OF INNOCENCE IN A SUCCESSIVE HABEAS PETITION, WHAT PROCESS IS REQUIRED TO CONDUCT A FULL AND FAIR HEARING TO AFFORD FOR A RELIABLE DETERMINATION? 5

QUESTION 3: WHEN A HABEAS CORPUS PETITIONER HAS BEEN ALLOWED TO FILE A SUCCESSIVE PETITION IN A FEDERAL DISTRICT COURT, WHAT STANDARD APPLIES? 8

A. THIS COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER *SCHLUP* OR 2244(B) APPLIES FOR EVALUATING CLAIMS OF ACTUAL INNOCENCE IN SUCCESSIVE PETITIONS 8

B. THIS COURT SHOULD GRANT THE WRIT TO DECIDE HOW TO TREAT SUCCESSIVE PETITIONS THAT INCLUDE CLAIMS UNDER *BRADY V. MARYLAND* 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases Page(s)

Brady v. Maryland,
373 U.S. 83 (1963) 1, 11, 12

Calderon v. Thompson,
523 U.S. 538 (1998) 5, 9

House v. Bell,
547 U.S. 518 (2006) 3, 4, 5

Dickerson v. United States,
530 U.S. 428 (2000) 12

Florida v. Rodiguez,
469 U.S. 1 (1984) 7

Fuller v. Oregon,
417 U.S. 40 (1974) 11

Goldblum v. Klem,
510 F.3d 204 (3d Cir. 2007) 10

Herrera v. Collins,
506 U.S. 390 (1993) 3, 4

In re Davis,
2009 WL. 2486475 (2009) 1, 3

Inyo County, Cal. v. Pointe-Shoshone Indians,
538 U.S. 701 (2003) 2

Rinaldi v. U.S.,
434 U.S. 22 (1977) 2

Rompilla v. Beard,
545 U.S. 374 (2005) 2

Rush Prudential HMO, Inc. v. Moran,
536 U.S. 355 (2002) 9

Schlup v. Delo,
513 U.S. 298 (1995) ..... *passim*

Stewart v. Martinez-Villareal,
523 U.S. 637 (1998) 9

U.S. v. Beggerly,
524 U.S. 38 (1998) 7

Federal Constitution, Statutes, Regulations, and Legislative History

28 U.S.C.
§ 2244(b) ..... *passim*

Other Sources Cited

Matt Lait & Scott Glover, *Bruce Lisker Won't Be Retried for 1983 Slaying of His Mother*, L.A. TIMES, Sept. 22, 2009, at A1 2

Sandra Svoboda, *Tale of Two Homicides*, DETROIT METRO TIMES, Oct. 28, 2009, available at http://www.metrotimes.com/news/story.asp?id=14504 2

Kevin Sack, *Brothers Freed in Rape Case are Likely to Face Retrial*, N.Y. TIMES, Dec. 24, 1997, at A10 2

Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. OF L. AND SOC. SCI. 173 (2008) 2

Facts on Post-Conviction DNA Exonerations, Innocence Project, http://www.innocenceproject.org/news/Fact-Sheets.php 2

INTRODUCTION

The State's Brief in Opposition ignores the district court's distorted fact-finding process, the substantial evidence of Cooper's innocence, and the compelling reasons why this Court should ameliorate the lower courts' inconsistent approaches in a critical area of law. Although the State asks for blind reliance on "finality," it forgets that the circuit court is virtually split on the issue of Cooper's guilt or innocence, and that eleven judges publicly stated that Cooper should be given a fair hearing before the State is permitted to execute him.

Most important, the Opposition does not dispute the need for this Court to resolve: (1) how lower courts should deal with the conflict among *In re Davis*, 2009 WL 2486475 (2009), *Schlup v. Delo*, 513 U.S. 298 (1995), and § 2244(b); and (2) how the addition of Constitutional claims under *Brady v. Maryland*, 373 U.S. 83 (1963), complicates that conflict. In short, this case directly presents a proper vehicle for this Court to clarify the standard a petitioner must meet to establish actual innocence and to set guidelines for lower court fact-finding before applying that standard.

QUESTION 1: IS A PERSON CONVICTED OF MURDER, BUT LATER SHOWN TO BE INNOCENT, ELIGIBLE FOR EXECUTION?

The State never truly addresses the Petition's first question. Rather, the State avoids the issue, asserting that Cooper is not innocent. Opp. 17. One cannot rely on the State's assessment of innocence after it botched evidence preservation at the crime

scene, made Cooper its exclusive target a few days after the murders, destroyed potentially exculpatory bloody coveralls, presented false trial testimony about Pro-Ked's availability, and now cannot produce the missing blue shirt. As history shows, the prosecution is often the last to concede that it convicted the wrong person.[1]

Cooper's innocence is much more accurately evaluated by considering that an impartial tribunal, the circuit court, is virtually divided on the question, with at least eleven judges stating that Cooper should have a fair hearing to resolve this question. That alone is enough reason to grant the writ. *Inyo County, Cal. v. Pointe-Shoshone Indians*, 538 U.S. 701, 709 n.9 (2003) (certiorari granted to resolve "divergent views" within same circuit); *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (reviewing decision of "divided" circuit); *Rinaldi v. U.S.*, 434 U.S. 22, 25 (1977) (same).

---

[1] *See, e.g.*, Matt Lait & Scott Glover, *Bruce Lisker Won't Be Retried for 1983 Slaying of His Mother*, L.A. TIMES, Sept. 22, 2009, at A1; Sandra Svoboda, *Tale of Two Homicides*, DETROIT METRO TIMES, Oct. 28, 2009, available at http://www.metrotimes.com/ news/story.asp?id=14504; Kevin Sack, *Brothers Freed in Rape Case are Likely to Face Retrial*, N.Y. TIMES, Dec. 24, 1997, at A10. In the last 30 years, over 400 people in the United States have been exonerated, more than 100 of whom had been sentenced to death. *See* Samuel R. Gross, Convicting the Innocent, 4 ANN. REV. OF L. AND SOC. SCI. 173 (2008); Facts on Post-Conviction DNA Exonerations, Innocence Project, http://www.innocenceproject.org/news/Fact-Sheets.php.

The State cites the California Supreme Court's 1991 opinion on direct appeal stating that the evidence of guilt was "overwhelming." Opp. 20-21. In 1991, however, that court did not have any of the recent evidence of innocence cited in the Petition at pages 7-15, further detailed in Judge Fletcher's opinion. App. 423-29. Perhaps the best refutation, however, is the State's own full page footnote listing trial and post-trial exculpatory evidence. Opp. 24, n.8.

Nor were the district court's or the three-judge panel's decisions below faithful, as the State asserts, to this Court's teachings. Opp. 17. In *In re Davis*, this Court remanded a petition presenting compelling evidence of innocence to the district court for a full and fair hearing to determine if the evidence "clearly establishes" innocence. Cooper has never received such a full and fair hearing. The rulings below thus violated this Court's teachings in *Davis*, *House v. Bell*, 547 U.S. 518 (2006), and *Herrera v. Collins*, 506 U.S. 390 (1993).

The State is correct in one sense: this Court has not yet articulated the precise standard for establishing actual innocence under *Herrera*. Opp. 17. Through this case the Court could establish that standard and set parameters for lower court discovery and fact-finding.

The State argues that Cooper cannot meet the *Herrera* standard because the three-judge panel below concluded he did not meet the *Schlup* standard. Opp. 19, 20. But Judge Fletcher's dissent finds just the opposite: that Mr. Cooper met the *Schlup* standard, as well as the more stringent

AEDPA test. App. 417.[2] Given the evidence of innocence Cooper presented in the district court despite being denied discovery and excluded from testing, one can only imagine what he could have developed in a fair proceeding.[3]

The State repeatedly refers to post-conviction DNA testing done on the t-shirt, cigarette butts and A-41. Opp. 7, 8, 21-22. The State fails to mention, however, that it was Cooper who sought this testing, while the State opposed it for several years. Why would Cooper seek such testing if he were not innocent? Once the testing was ordered, however, the State had ample opportunity to tamper with evidence in hopes of upholding the conviction. Evidence pointing to tampering is not only in the State's results reporting heightened levels of EDTA (which it then withdrew (App. 355-64)), but in the State's criminalist's unexplained 24 hours with A-41 (App. 386), and cigarette butts recovered from Cooper's car and the hideout house that are now missing (App. 391-92). Nine circuit judges who *sua sponte* voted to allow Cooper to file a successive petition in 2004, and eleven circuit judges who

---

[2] What the State's argument displays is that innocence jurisprudence contains at least five standards: (1) *Schlup*, (2) § 2244(b), (3) *Herrera*, (4) *Davis*, and (5) the constitutional standards used in a first petition. This shows why the circuit and district courts could use this Court's clarifying review.

[3] For instance, Cooper only learned about the blue shirt when the State introduced the sheriff call logs in 2004. Likewise, Cooper only learned about blood contamination of VV-2 in 2004 when Dr. Melton discovered it during her tests of the hairs.

dissented from denial of rehearing, were aware of these DNA results, but wanted Cooper to have a fair hearing about tampering.

Citing *Calderon v. Thompson*, 523 U.S. 538, 558 (1998), the State appears to claim that, as a result of AEDPA, only new, post-trial evidence can be part of a court's actual innocence analysis. Opp. 23. *Calderon* says nothing of the kind. Rather, this Court simply elucidated the proper standard ("miscarriage of justice") that courts should apply when deciding whether to withdraw a previously issued mandate. Regardless, the State's misguided premise about the affect of AEDPA shows how its enactment created uncertainty about its application in all innocence cases.

QUESTION 2: WHEN A DISTRICT COURT MUST CONDUCT AN EVIDENTIARY HEARING WITH RESPECT TO EVIDENCE OF INNOCENCE IN A SUCCESSIVE HABEAS PETITION, WHAT PROCESS IS REQUIRED TO CONDUCT A FULL AND FAIR HEARING TO AFFORD FOR A RELIABLE DETERMINATION?

To date, this Court has not described what proceedings are appropriate when, as part of a successive petition, a condemned prisoner seeks to prove his innocence. That was not necessary in *Davis* because no district court had yet heard the evidence to be presented in a successive petition. This case, however, presents that issue directly, because there is a record of unfair proceedings in a district court.

The State suggests that existing rules, statutes and judicial pronouncements on discovery and presentation of evidence for first petitions, which may not include innocence claims, are sufficient. Opp. 27. The record in this case shows they are not.

Cooper was denied due process with respect to the testing of forensic evidence in his case. Pet. 3-4; App. 341. It is fundamental that the party with the burden of proof should be allowed, within some appropriate boundaries, to design the forensic testing that he says could prove his claims. In this case, however, the district court excluded Cooper from any meaningful participation in the testing, and used its own uninformed thinking, along with that of the State, to design and implement the testing. App. 342-45. The result was a disaster: when the EDTA test results supported Cooper's assertion, the district court allowed them to be "withdrawn" without explanation. App. 352-53. Meanwhile none of the necessary preliminary analysis was done to show whether the tested stain contained Cooper's blood or DNA. App. 346-47. Similarly, the hairs that the district court sent for mitochondrial DNA testing had previously been excluded as potentially exculpatory. App. 421-22.

Compounding these errors, the district court denied Cooper any discovery. App. 310. It is axiomatic that a petitioner claiming innocence is severely hampered in obtaining forensic and other evidence in the hands of the prosecution. Because the current Rules Governing Section 2254 Cases permit discovery only with a district court's authorization, a district court may inadvertently or intentionally prevent a petitioner from obtaining

much of the existing forensic evidence proving innocence. Here, the district court denied Cooper any discovery on A-41 and the missing cigarette butts.

Cooper was further thwarted by the district court's limiting testimony at the evidentiary hearing. It refused to permit questioning Josh Ryen about his statements that the attackers were three white men. It denied Cooper's request to examine the criminalist who tested and later removed A-41 from the crime lab. It denied Cooper the opportunity to examine files a deputy reviewed looking for a phone message from Warden Carroll.

This Court has supervisory authority over the lower federal courts, and may grant a writ to correct errors and provide guidance on federal procedural rules. *Florida v. Rodiguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting) (noting that Court has supervisory authority over lower courts and can perform pure error-correcting function); *U.S. v. Beggerly*, 524 U.S. 38 (1998) (supervisory authority extends to the construction of federal rules of criminal procedure). Granting the writ could provide standards to follow to allow innocence claims to be fully developed. It could also define when a new fact-finder should be assigned to make sure that an impartial innocence determination is made.

QUESTION 3: WHEN A HABEAS CORPUS PETITIONER HAS BEEN ALLOWED TO FILE A SUCCESSIVE PETITION IN A FEDERAL DISTRICT COURT, WHAT STANDARD APPLIES?

A. This Court Should Grant the Writ to Decide Whether *Schlup* or 2244(b) Applies for Evaluating Claims of Actual Innocence in Successive Petitions.

The State concedes that a question exists as to whether *Schlup* has been superseded by § 2244(b), and only contests whether this question is implicated in these proceedings. Opp. 31. As shown by the lower court decisions ruling on Cooper's successive petition, the question of whether to apply *Schlup* or § 2244(b) to newly discovered evidence of innocence is unsettled. Pet. 19. The State's position that the question need not be addressed might have been correct if every judge analyzing Cooper's claims agreed that he did not meet either standard. However, this simply is not the case.

The State incorrectly claims: "Conspicuously absent from Fletcher's decision is the acknowledgement that the AEDPA applies." Opp. 23. The fact is that the dissent found that Cooper met *both* the *Schlup* and AEDPA standards. App. 395. Judge Fletcher applied both standards because, currently, the question of which standard applies is undecided in the Ninth Circuit. App. 283-84.

The State also argues incorrectly that there is no conflict among the circuits with respect to this question. Not only do the opinions cited in Cooper's

Petition demonstrate a direct conflict among some circuits (Pet. 27-31), but they illustrate a difference in application of the standards. As this Court has made clear, a certiorari petition need not identify a "genuine conflict" between the circuits, provided it identifies a "conflict in principle" that is sufficiently important. *See Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 364 (2002) (certiorari granted to review Seventh Circuit ERISA preemption analysis of Illinois statute that "conflicted with the Fifth Circuit's treatment of a similar provision of Texas Law"); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641 (1998) (resolving "apparent" circuit split regarding AEDPA application to successive *Wainwright* claims).

The State's cursory discussion of the conflicting decisions highlights the differing approaches among the circuits. So does its citing cases in which this Court used a standard different from § 2244(b) when addressing cases of actual innocence. Opp. 23 (citing *Calderon v. Thompson*, 523 U.S. 538 (1998)). The State asserts that the Eleventh Circuit in *Jordan* "*merely* held that it could not ignore the enactment of the AEDPA, and therefore had to apply § 2244 to a coerced confession claim." Opp. 31 (emphasis added). In so ruling, however, the *Jordan* court reasoned that *Schlup* no longer applies to claims presenting newly discovered evidence of innocence. Pet. 28-29. Accordingly, in direct conflict with *Schlup*, the *Jordan* petitioner's new evidence of actual innocence was never considered by the court.

The State argues that "Nothing in *Jordan* conflicts with Petitioner's case, in which both the *Schlup* standard and § 2244(b) were applied to

successive petition claims." Opp. 31. The State also argues that the Third Circuit's decision in *Goldblum v. Klem*, 510 F.3d 204, 205 (3d Cir. 2007), which applied both *Schlup* and § 2244(b), is not in conflict with the present case. Opp. 31-32. This argument misses the point: the analyses in these two cases are in conflict with each other. The Ninth Circuit has not decided which standard applies, but on the same question other circuits are divergent.

Whether a circuit court has steadfastly refused to apply *Schlup* following the enactment of § 2244(b), continued to apply *Schlup* in cases of actual innocence, struggled to reconcile the two standards by meshing them together, or, as the circuit court has done in this case, posed the question but left its resolution for another day, what is painfully clear is that there is no uniform standard being applied in successive petitions presenting evidence of actual innocence.

Recently, a former member of the U.S. House of Representative Judiciary Committee who debated and voted on AEDPA wrote in an editorial:

> I can state unequivocally that [AEDPA] was not intended to preclude a claim of actual innocence based on post-sentence evidence from being considered in a habeas petition. Employing such a pinched and erroneous reading of the law to deny a condemned man the opportunity to present substantial evidence of innocence would constitute a travesty of justice in America.

Bob Barr, *Constitutional Question*, WASH. TIMES, Sept. 3, 2009, at A23. This case presents this Court

with the opportunity to resolve the issue about how and when § 2244(b) should be applied to innocence cases.

B. This Court Should Grant the Writ to Decide How to Treat Successive Petitions that Include Claims Under *Brady v. Maryland*.

The State would similarly have the circuits continue to struggle with the proper standard for *Brady* claims in successive petitions. The State cannot deny, however, that the circuits are divergent about what standard applies to *Brady* claims in successive petitions. This Court should grant certiorari "because of the importance of the question presented and the conflict of opinion on the constitutional issue involved." *Fuller v. Oregon*, 417 U.S. 40, 42 (1974).

While the Fourth and Eleventh Circuits have strictly applied the AEDPA's "clear and convincing" standard to *Brady* claims in later-filed petitions, the Ninth and Tenth Circuits have avoided AEDPA's application, instead relying on the *Brady* "reasonable probability of a different result" standard. Pet. 33-36. The courts' struggle with these different standards shows how capricious a strict application of the AEDPA can be.

The State also argues that whether "successive *Brady* claims are exempt from gateway innocence requirements was not reached below." Opp. 32. However, the key issue presented, as recognized by both *amicus curiae* briefs, is whether AEDPA has altered the "constitutional rule" established in

Brady. As highlighted by *Amicus* Innocence Network, "AEDPA's higher 'clear and convincing' standard would preclude all meaningful relief for a significant class of constitutional violations – those that meet the *Brady* standard but not AEDPA's." Innocence Network Brief 10. When material exculpatory evidence emerges after a first petition, there is an issue regarding the standard by which a court should determine if an accused's constitutional right to Due Process has been violated.

This Court should decide whether AEDPA is itself unconstitutional as applied to *Brady* claims in successive petitions. It is well-established that "Congress may not legislatively supersede [Supreme Court] decisions interpreting and applying the Constitution." Innocence Network Brief 10 (citing *Dickerson v. United States*, 530 U.S. 428, 437 (2000)). The lower court here stated that new claims in a successive petition must meet a "[r]igid [s]tandard under AEDPA." App. 90. Should courts be able to apply this rigid standard to a *Brady* constitutional claim when, through no fault of the defense, it is the government who failed to meet its ethical and constitutional obligations?

The Court should address this question not only for the important constitutional issues it raises, but also because the *Brady* violations in this case undermine Cooper's conviction. Even the state touts the importance of shoe print evidence. Opp. 3-4. The same is true as to the suppressed evidence demonstrating that the State authorized the destruction of the bloody coveralls and failed to test or disclose a bloody blue shirt recovered near the crime scene. The State successfully suppressed

material evidence for two decades. Especially in light of this newly discovered evidence, "[t]o allow the state's representatives to violate their ethical obligations and duties under *Brady* to disclose exculpatory evidence, to stall until after a first federal petition has been filed before producing such evidence, and then to penalize the defendant both for the state's transgressions and its delay violates notions of due process and fundamental fairness." CACJ and CDPA Brief 15.

CONCLUSION

Because this case presents significant questions about innocence and the standards that should be applied in successive petitions, the writ should be granted.

Respectfully submitted,

David Todd Alexander, Esq.
332 Sheridan Avenue
Peidmont, CA 94611
Telephone: (650) 387-4382
Facsimile: (510) 654-3773

Norman C. Hile
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
400 Capitol Mall
Suite 3000
Sacramento, CA 95814
Telephone: (916) 329-7900
Facsimile: (916) 329-4900